

BEFORE LINDA McCULLOCH, STATE SUPERINTENDENT OF PUBLIC INSTRUCTION,
STATE OF MONTANA

J.C.)	
Appellant,)	
)	OSPI 314-07
vs.)	
)	DECISION AND ORDER
BOARD OF TRUSTEES OF GREAT FALLS)	
PUBLIC SCHOOLS, SCHOOL DISTRICT)	
NO. 1,)	
)	
Respondent.)	
)	

Having reviewed the record and considered the parties' briefs, the Superintendent of Public Instruction issues the following decision and order:

The July 24, 2007 Order issued by the Cascade County Superintendent of Schools in which he determined he did not have jurisdiction over the case is REVERSED, and this matter is remanded to the County Superintendent for further proceedings.

PROCEDURAL HISTORY

On May 29, 2007, the Board of Trustees of Great Falls Public School, District No. 1, (District) voted to expel J.C. for the remainder of the 2006 – 2007 school year for violation of District policy 3300. (Order dated 7/24/2007.) On June 27, 2007, J.C. filed a Notice of Appeal with the Cascade County Superintendent of Schools appealing the May 29, 2007 decision of the

District to expel J.C. for the rest of the 2006-2007 school year. (Notice of Appeal dated 6/27/07.)

On July 10, 2007, the District filed a Response to Appeal of J.C. alleging the County Superintendent did not have jurisdiction over this matter. (Response of District to Appeal of J.C. dated 7/10/07.)

On July 20, 2007 J.C. filed a brief responding to the issue of jurisdiction. (Petitioner's Brief in Support of the County Superintendent's Jurisdiction dated 7/20/07.)

The Cascade County Superintendent of Schools issued his Order on July 24, 2007, determining the County Superintendent lacked jurisdiction as it was not a case in controversy pursuant to Mont. Code Ann. § 20-3-210(1) (2005) and as defined by Admin. R. Mont. 10.6.102 (2006). (Order dated 7/24/2007.)

J.C. filed a Notice of Appeal with the State Superintendent on August 23, 2007. (Notice of Appeal dated 8/23/07.)

ISSUE ON APPEAL

Does the County Superintendent have jurisdiction to hear this appeal?

STANDARD OF REVIEW

The State Superintendent's review of a county superintendent's decision is based on the standard of review of administrative decisions established by the Montana Legislature in Mont. Code Ann. § 2-4-704 (2007) and adopted by the State Superintendent in Admin. R. Mont. 10.6.125:

(4) The state superintendent may not substitute his/her judgment for that of the county superintendent as to the weight of the evidence on questions of fact. The state superintendent may affirm the decision of the county superintendent or remand the case for further proceedings or refuse to accept the appeal on the grounds that the state superintendent fails to retain proper jurisdiction on the matter. The state superintendent may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the findings of fact, conclusions of law and order are:

- (a) in violation of constitutional or statutory provision;
- (b) in excess of the statutory authority;

- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable probative and substantial evidence on the whole record;
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion;
- (g) affected because findings of fact upon issues essential to the decision were not made although requested.

Admin. R. Mont. 10.6.125 (4).

Findings of fact are reviewed under a clearly erroneous standard. *Steer, Inc. v. Dept. of Revenue*, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990). The Montana Supreme Court set forth the three prongs of the clearly erroneous standard of review which applies to findings of fact:

We adopt the following three-part test to determine if a finding is clearly erroneous. First, the Court will review the record to see if the findings are supported by substantial evidence. Second, if the findings are supported by substantial evidence we will determine if the trial court has misapprehended the effect of evidence. [*Western Cottonoil Co. v. Hodges* \(C.A. 5th 1954\), 218 F.2d 158; *Narragansett Improvement Company v. United States* \(C.A. 1st 1961\), 290 F.2d 577](#). Third, if substantial evidence exists and the effect of the evidence has not been misapprehended the Court may still find that “[A] finding is ‘clearly erroneous’ when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction that a mistake has been committed.” [*U.S. v. U.S. Gypsum Co.* \(1948\), 333 U.S. 364, 68 S. Ct. 525, 92 L. Ed. 746](#).

Interstate Production Credit v. DeSaye, 250 Mont. 320, 323, 820 P.2d 1285, 1287 (1991).

Conclusions of law are reviewed to determine if the interpretation of the law is correct.

"The reasoning for simply determining if the [superintendent's] conclusions are correct is that no discretion is involved when a tribunal arrives at a conclusion of law – the tribunal either correctly or incorrectly applies the law." *Steer, Inc. v. Dept. of Revenue*, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990); *Baldrige v. Bd. of Trs.*, 264 Mont. 199, 205, 870 P.2d 711, 714 (1994).

FINDINGS OF FACT

1. J.C. was a student at Great Falls High School in the spring of 2007. (Petitioner's Brief in Support of the County Superintendent's Jurisdiction Herein dated 7/20/07.)

2. J.C. was accused of writing a note containing threatening language one day after

the shooting of students and teachers at Virginia Tech University. (Notice of Appeal to Cascade County Superintendent of Schools dated 6/27/07.)

3. Superintendent Bryan Dunn filed with the Board of Trustees a recommendation of the Great Falls High School Principal that J.C. be expelled, and sent a letter stating such to J.C. (Notice of Appeal to Cascade County Superintendent of Schools dated 6/27/07.)

4. The Board of Trustees for the District held hearings related to the recommended expulsion of J.C. on May 14, 2007, and May 29, 2007. J.C. and her mother were present and testified and presented evidence. The Board heard testimony and reviewed a variety of evidence. (Notice of Appeal to Cascade County Superintendent of Schools dated 6/27/07.)

5. The Board of Trustees for the District expelled J.C. from school on May 29, 2007 for the remainder of the school year. (Notice of Appeal to Cascade County Superintendent of Schools dated 6/27/07.)

6. The District has adopted discipline policies which were in effect on May 29, 2007:

3300 STUDENTS – CORRECTIVE ACTIONS AND PUNISHMENT

Corrective Actions and Punishment

All students shall submit to the reasonable rules of the District. Refusal to comply with written rules and regulations established for the governing of the school shall constitute sufficient cause for discipline, suspension, or expulsion.

Suspensions or expulsions shall be used only for instances of serious student misconduct.

No student shall be expelled, suspended, or disciplined in any manner for any act not related to the orderly operation of the school or school-sponsored activities or any other aspect of the educational process.

3300R STUDENTS – CORRECTIVE ACTIONS AND DISCIPLINE

Corrective Actions and Discipline

It is the intent of the Board to provide each student with those due process rights which are provided by law.

Expulsion

A student may be expelled from school only by the Board, and only after the following due process procedures have been followed and of the students (sic) right to request a hearing of the charges.

The student and parent or legal guardian shall be provided a written notice of the recommendation for expulsion by registered or certified mail or hand delivered. The student and parent must request, in writing, a hearing before the Board within ten (10) days of receipt of the notice of the recommendation for expulsion or the student and parent shall waive the right to a hearing before the Board.

If a hearing is requested, the Superintendent shall schedule a hearing at a regular or special meeting of the Board. It is the Board's intent to conduct the hearing in a closed session unless the parent or legal guardian requests a public hearing.

. . .

At the hearing, the student may be represented by counsel, present witnesses and other evidence, and cross-examine witness (sic). Formal rules of evidence are not binding on the Board.

3310 STUDENTS – STUDENT DISCIPLINE

Disciplinary action may be taken against any student guilty of disobedience or misconduct, including, but not limited to: . . . rules and regulations governing student conduct . . . Using violence, force, noise, coercion, threats, intimidation, fear, or other comparable conduct toward anyone or urging other students to engage in such conduct. . . . Engaging in any activity that constitutes an interference with school purposes or an educational function or any disruptive activity. . . . Any conduct that would constitute any violation of Montana Law will be reported to the police. . . . These grounds for disciplinary action apply whenever the student's conduct is reasonably related to school or school activities, including, but not limited to: . . . Anywhere, if the conduct may reasonably be considered to be a threat or an interference with school purposes of an educational function.

Disciplinary Measures

Disciplinary measures include, but are not limited to:
Expulsion . . .

(Appeal Brief of Great Falls School District No. 1 dated 10/24/07).)

CONCLUSIONS OF LAW AND OPINION

Issue: Does the County Superintendent have jurisdiction to hear this appeal?

The State Superintendent's duty in this matter is to determine if the County Superintendent correctly determined he did not have jurisdiction to hear J.C.'s appeal.

The county superintendent of schools has authority to "hear and decide all matters of controversy arising in the county as a result of decisions of the trustees of a district in the county." Mont. Code Ann. § 20-3-210 (2007). The Superintendent of Public Instruction has prescribed and enforces "rules of practice and regulations for the conduct of hearings and the determination of appeals by all school officials of the state." Mont. Code Ann. § 20-3-107 (2007).

A person aggrieved by a final decision of the board of trustees of a school district in a contested case is entitled to appeal that decision to the county superintendent. Admin. R. Mont. 10.6.103.

A county superintendent, after receiving notice of an appeal, must determine whether the appeal is a contested case and whether he has jurisdiction over the matter. Admin. R. Mont. 10.6.104(1). In situations involving contested cases, the superintendent may resolve questions of jurisdiction based upon the pleadings or after a hearing, as necessary to suit the circumstances of the case. Admin. R. Mont. 10.6.104(2). If the county superintendent determines he does not have jurisdiction over a matter, he shall enter an order dismissing the appeal for lack of jurisdiction. Admin. R. Mont. 10.6.104(3). If the county superintendent determines the matter is a contested case pursuant to Admin. R. Mont. 10.6.104 and he has jurisdiction, he shall hear the appeal and take testimony in order to determine the facts related to the contested case. *Id.*

In reviewing a decision made by a school district board of trustees, the county superintendent is to submit a final decision in writing. Mont. Code Ann. § 2-4-623(1)(a) (2007).

The decision must include findings of fact and conclusions of law, separately stated. *Id.* Findings of fact must be based exclusively on the evidence and on matters officially noticed. Mont. Code Ann. § 2-4-623(2) (2007).

Thus, according to the regulations, a county superintendent can resolve jurisdictional questions in contested cases based on the pleadings alone; no hearing is mandated. The county superintendent is required to have a hearing only if the matter involves a contested case and he has jurisdiction.

"Contested case" is defined as "any proceeding in which a determination of legal rights, duties or privileges of a party is required by law to be made after an opportunity for hearing." Admin. R. Mont. 10.6.102.

The Montana Supreme Court has determined a dispute does not rise to the level of a contested case unless the individual has a constitutional interest at stake or a statutory right to a hearing. *Roos v. Kircher Public Sch. Bd. of Trs.*, 2004 MT 48, ¶10, 320 Mont. 128, 131, ¶10, 86 P.3d 39, 41, ¶10 (2004) (nontenured teacher failed to allege any violation of state statute granting an administrative hearing or constitutionally protected interest which would entitle her to a hearing before the county superintendent). Quoting from a decision issued by the State Superintendent of Schools, the court in *Roos* said,

In *Bland v. Libby School District* (1993) (OSPI 205-92, 12 Ed. Law 76), the State Superintendent stated, "To be appealable to the County Superintendent the policy decision at issue must be governed by a statute that grants an administrative hearing or an interest constitutionally protected by due process must be at stake . . ."

Id. See also *Dupuis v. Bd. of Trs., Ronan Sch. Dist. No. 30*, 2006 Mont. 3, ¶10, 330 Mont. 232, 235-236, ¶10, 128 P.3d 1010, 1012, ¶10 (2006) ("a county superintendent does not have jurisdiction over a matter absent a constitutional or statutory right to a hearing") (discrimination claim based on school's use of names "Chief" and "Maiden" should have been brought before Montana Human Rights Commission, not county superintendent).

In the case at issue, the County Superintendent determined J.C. had no statutory right which had been violated. (Order dated 7/24/2007.) He found, further, that Article X, Section 1 of the Montana Constitution "does not provide a constitutionally protected property right to an individual of an implicit right to an education." (Order dated 7/24/2007.)

A. Does J.C. present an issue governed by a statute which grants an administrative hearing?

The supervision and control of the public schools in each district is vested in a board of trustees pursuant to Art. X, § 8. The trustees must "govern the pupils of the district in accordance with the provisions of the pupils chapter of this title." Mont. Code Ann. § 20-3-324 (3) (2007). According to the "pupils" chapter, every school district must, through its trustees, adopt a policy and procedures related to suspension and expulsion.

The trustees of the district shall adopt a policy defining the authority and procedure to be used by a teacher, superintendent, or principal in suspending a pupil and defining the circumstances and procedures by which the trustees may expel a pupil. Expulsion is a disciplinary action available only to the trustees.

Id. Neither this statute nor any other outlines the form of those policies, nor does any statute require that the requisite policy adopted by a board mandate a hearing in the suspension or expulsion process.

The District had adopted and had in place policies as required by Mont. Code Ann. § 20-5-201 (1)(a) (2007).

While students are to be assigned and admitted to district schools, Mont. Code Ann. § 20-5-102 (2007), the student must be "otherwise qualified under the provisions of this title to be admitted to the school." Mont. Code Ann. § 20-5-101 (2007). A student who has been expelled pursuant to Mont. Code Ann. § 20-5-202 is not "otherwise qualified" to be enrolled in school. Further, although enrollment is generally compulsory, a student is exempt from compulsory enrollment when "excused by the board of trustees upon a determination that attendance by a

child who has attained the age of 16 is not in the best interest of the child and the school." Mont. Code Ann. § 20-5-102 (2)(d) (2007).

Students have duties as well as rights. A pupil must "comply with the policies of the trustees and the rules of the school that the pupil attends." Mont. Code Ann. § 20-5-201 (1)(a) (2007). If a student does not comply with those policies, the student may be suspended or expelled. Mont. Code Ann. § 20-5-202 (1) (2007).

District Policy 3300R specifically addresses the intent of the board to provide students with the due process rights provided by law. A board hearing over a student expulsion is not mandatory under 3300R, nor is it statutorily required. Per board policy, a student and parent must request, in writing, a hearing before the Board within ten days of receipt of notice of recommendation for expulsion, or the right to a hearing before the Board is waived.

J.C. and her parents requested a hearing before the Board, and received that hearing. According to Policy 3300R, "[a]t the hearing, the student may be represented by counsel, present witnesses and other evidence, and cross-examine witness (sic)." J.C. availed herself of those opportunities.

The hearing the District provided to J.C. afforded her with due process under the District policies. J.C. failed to identify any statutory right to a hearing in relation to her expulsion. The county superintendent has no jurisdiction over this case on the basis of a statutory right to a hearing.

B. Is an interest constitutionally protected by due process at stake?

Article X, Section 1 (1) of the Montana Constitution states, "It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state."

In one of the Montana Supreme Court's seminal opinions on whether a student had a constitutional right to participate in school extracurricular activities, the court set forth Article X, § 1, and then stated,

The provisions of Art. X demonstrate there are constitutional rights and obligations which extend to all sides of the question of education. There is the right to equality of educational opportunity guaranteed to each person. There is the goal to establish a system of education which will develop the full educational potential of each person. . . . The legislature is obligated to provide a basic system of free quality education. . . . The school trustees are vested with the authority to discharge these obligations and protect the rights.

State ex rel. Bartmess v. Bd. of Trs. Sch. Dist. No. 1, 223 Mont. 269, 274, 726 P.2d 801, 804 (1986). In *Bartmess*, the court found a student's right to participate in extracurricular activities, while subject to constitutional protection, was not a fundamental right under the Montana Constitution. *Id.* at 275, 726 P.2d at 805. Further, the court held the trustees' adoption of a rule requiring a 2.0 average to participate in non-academic or extracurricular activities furthered a legitimate state interest in that it provided an incentive for students to participate in extracurricular activities and promoted adequate time to study for those students who had not maintained a 2.0 grade average. *Id.* at 276, 726 P.2d at 805.

In a case written more than a decade later, the Montana Supreme Court considered whether a student who attended a private school should be allowed to participate in public school sports when the school board's policy limited participation to students enrolled full time in public school. *Kaptein v. Conrad Sch. Dist.*, 281 Mont. 152, 931 P.2d 1311 (1997). The student argued, based on Article X, Section 1, of the Montana Constitution, that she had a constitutionally protected right to participate in public school extracurricular activities. *Id.* at 155, 931 P.2d at 1313. Referring to the *Bartmess* decision, the court in *Kaptein* said,

Without addressing the question of whether education itself is a fundamental right, we held that participation in extracurricular activities was *not* a fundamental right; that the

claim warranted a middle-tier analysis and that the 2.0 rule did not violate either the equal protection clause or the equal educational opportunity clause found in Article X, Section 1, of the Montana Constitution.

Id. at 160, 931 P.2d at 1316 (citations omitted) (underlined emphasis supplied). The court applied the same middle-tier analysis it had used in *Bartmess* to preclude the student who attended private school from participating in the public school system's extracurricular activities.

Id. at 162, 931 P.2d at 1317. The court in *Kaptein* did not hold that education itself was a fundamental right.

In *Bartmess* and in *Kaptein*, students argued before the state district and supreme court that the guaranteed equality of educational opportunity under Article X, § 1 of the Montana Constitution entitled them to rights beyond limits set by school board policies. In both cases, the Montana Supreme Court, using a middle-tier analysis, carefully considered the constitutional provision in relation to the specific facts and issued decisions supporting the local districts' particular board policies.

The Montana Supreme Court has not stated that education itself is a fundamental right; it has specifically avoided making that determination when considering Article X, § 1 of the Montana Constitution. It has, however, found that student participation in extracurricular activities, while not a fundamental right, is "clearly subject to constitutional protection."

Kaptein, 281 Mont. at 160, 931 P.2d at 1316 (citing *Bartmess*; citations omitted).

No Montana Supreme Court cases subsequent to the definitive decisions in *Roos* and *Dupuis* have addressed the question of whether Article X, § 1 of the Montana Constitution, in conjunction with student discipline under school board policies, provides an interest constitutionally protected by due process such that a county superintendent has jurisdiction over an appeal from a disciplinary decision of a school board.

The State Superintendent has, however, subsequent to *Roos* and *Dupuis*, found a county superintendent has jurisdiction, based on the student's constitutionally protected right to participate in extracurricular activities, to hear a student's appeal of a board's suspension of the student. *Harper v. Bd. of Trustees of Shepherd Sch. Dist. No. 37*, OSPI 298-04. In that case, the State Superintendent directed the county superintendent, who had concluded he had no jurisdiction over the issue, to hold a hearing to determine whether the student's right to participate was violated by misapplication of the district's policies. *Id.*

A student's right to attend school is entitled to equal or greater constitutional protection than a student's right to participate in extracurricular activities. Because a county superintendent has jurisdiction to hear a student's appeal from a school board's suspension when it affects a student's participation in extracurricular activities, it follows that a county superintendent has jurisdiction to hear a student's appeal from a school board expulsion because it affects the student's right to attend school.

Therefore the county superintendent has jurisdiction to hear J.C.'s appeal as she has at stake an interest constitutionally protected by due process; the issue presented is a contested case.

Under *Steer* and *Baldridge*, the State Superintendent reviews the Cascade County Superintendent's legal conclusions to determine if his interpretation of the law was correct. Here the County Superintendent incorrectly concluded he did not have jurisdiction to hear J.C.'s appeal. The order is reversed and the case is remanded to the County Superintendent to proceed pursuant to Admin. R. Mont. Title 10, Chapter 6. The County Superintendent is permitted pursuant to Admin. R. Mont. 10.6.108(1)(c) to accept admissions of fact and documents provided in the proceeding before the board to avoid unnecessary proof.

DECISION AND ORDER

The July 24, 2007 Order issued by the Cascade County Superintendent of Schools in which he determined he did not have jurisdiction over the case is REVERSED, and this matter is remanded to the County Superintendent for further proceedings.

DATED this 4th day of February, 2008.

/s/ Linda McCulloch
Linda McCulloch,
Superintendent of Public Instruction

NOTICE:

You are entitled to judicial review of this Decision and Order in accordance with Mont. Code Ann. § 2-4-702 (2007). Judicial review may be obtained by filing a petition in district court within thirty days after the service of this Order.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 4th day of February, 2008, I caused a true and exact copy of the foregoing DECISION AND ORDER to be mailed, postage prepaid, to the following:

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